

DECEMBER 22. 1780.

(24)

UNTO THE RIGHT HONOURABLE
THE LORDS OF COUNCIL AND SESSION,
THE
PETITION AND COMPLAINT

O F

CAPTAIN JOHN TRAIL of His Majesty's
Marine Forces,

HUMBLY SHEWETH,

THAT, at the meeting of the freeholders of the county of Orkney upon the 10th day of October last, for the election of a commissioner to represent the said county in parliament, the complainer claimed to be inrolled in the roll of the said freeholders, upon the following titles:

1mo, Charter under the seal appointed in the treaty of Union to be kept and used in Scotland in place of the Great Seal thereof, dated the 3d day of July 1779, in favour of Sir Lawrence Dundas of Kerse, Baronet, of certain lands in the county of Orkney, and particularly the island and lands of Flottay and Swinnay, with the holmes of Southay, and calf of Flottay, with the teind-sheaves of the said island and lands; and also "all and hail the lands and others after mentioned, *which of old pertained to Robert Stewart of Burgh*, viz. the seven penny half penny land called *the Bull of Burgh*, the room and lands of Northwidewall, &c. lying in the island of Southronaldsay, and stewartry of Orkney."

2do, Disposition dated the third day of September 1779, granted by the said Sir Lawrence Dundas to the complainer, Captain Trail, in
liferent

liferent, and himself in fee, of the lands particularly above mentioned, lying in the island of Southronaldsay, containing an assignation to the writs and evidents thereof, and particularly to the above charter, with the precept of *feisin* therein contained, in so far as concerns the lands thereby disposed.

3^{to}, Instrument of *feisin* in the said lands, following upon the said charter and disposition in favour of the complainer in *liferent*, dated the 22d September, and recorded in the particular register of *feisins* for the county of Orkney the 25th day of the said month of September 1779.

And, 4^{to}, A certificate under the hands of two of the Commissioners and of the Clerk of Supply, and the Collector of the Cefs of the said county, bearing, that the islands and lands of Flottay and Swinnay, and Calf of Flottay, stood rated and valued in the valuation and cefs-books of Orkney as follows, viz. Flottay at the sum of L. 241 : 8 : 10 $\frac{1}{2}$ Scots, and Swinnay at the sum of L. 39 : 9 : 5 Scots, and also that the lands of Burgh and others *which of old pertained to Robert Stewart of Burgh*, thereafter to John and Archibald Stewarts, elder and younger of Burgh, and now to Sir Lawrence Dundas of Kerfe, Baronet, viz. the lands called the *Bull of Burgh*, &c. stand rated and valued in the said books at the sum of L. 146 : 3 : 4 Scots, extending the valued rent of the whole of the said lands to the sum of L. 427 : 1 : 7 $\frac{1}{2}$ Scots, and that they pay cefs or land-tax according to the said rates or valuations.

Against this claim, and the above titles produced for supporting the same, certain objections were stated by *Robert Baikie of Tankerness*, one of the freeholders, which were followed with answers and replies; and the majority of freeholders on the roll being in the interest of Mr Baikie, and determined to carry the election for that gentleman, were pleased to sustain the said objections to the complainer's qualification, and to dismiss his claim. But the complainer, apprehending that the meeting thereby did wrong, and that they ought to have inrolled him, now makes this application to your Lordships for redress, under the authority of the 16th of his late Majesty, and of an act of the 14th of his present Majesty, both well known to your Lordships.

The first objection made by Mr Baikie was thus stated: "That
" the valued rent of the lands and others upon which Captain
" Trail claimed to be inrolled did not amount to L. 400 Scots; at
" least there was no sufficient evidence produced that their valua-

" tion



“ ation was of that amount, and particularly that as to the seven
 “ penny halfpenny lands called *the Bull of Burgh*, &c. mentioned
 “ in his claim, there was no evidence produced of the valued rent
 “ of these lands, nor was there any article or articles contained in
 “ the valuation-book which applied specially to them.”

And in addition to this objection it was stated by Mr Baikie, in
 his reply, “ That he still insisted there was no article in the valua-
 “ tion-book of the county which could apply to the lands describ-
 “ ed in Captain Trail’s claim and titles, as sometime belonging to
 “ Robert Stewart of Burgh, and the valuation whereof was stated
 “ as amounting to L. 146 : 3 : 4 Scots ; because, upon examining
 “ the valuation-book, no mention whatever was made therein of
 “ the lands of Burgh, or of the lands called *Bull of Burgh*, &c. ;
 “ nor did the valuation-book instruct to the satisfaction of the free-
 “ holders, that the said lands stood valued therein, far less that they
 “ were the whole lands which formerly belonged to Robert Stew-
 “ art of Burgh, and which, at the time of the valuation of
 “ the said stewartry in 1653, did amount to the said sum of
 “ L. 146 : 3 : 4 Scots.”

But to this it was answered, in the first place, that the com-
 plainer’s right to the whole articles of valuation founded on by him,
 is sufficiently instructed by the certificate of the two Commissioners,
 the Clerk and Collector, bearing that the lands claimed upon,
 and contained in the claimant’s titles, are valued in the manner al-
 ready mentioned ; and particularly that the lands, “ which some-
 “ time pertained to Robert Stewart of Burgh,” and now to Sir
 Lawrence Dundas, are valued at L. 146 : 3 : 4 ; and that cess is
 paid for the same according to that valuation.

But further, the certificate is supported by the valuation-book of
 the county, in which, among the lands contained in the island of
 Southronaldsay, there is an article stated in these words : “ *Robert*
 “ *Stewart of Burgh* has of free rent, within the said isle forty-two
 “ meils three setteens malt, and in flesh and grassum fourteen
 “ pounds, whereof deduce for the superior duty nyne pound ten
 “ shillings. Remains of free rent, forty two meils three setteens,
 “ and four pound ten shillings of money, is L. 146 : 3 : 4.”

Now the Crown charter in favour of Sir Lawrence Dundas,
 and his disposition to the complainer, expressly describe this parcel
 of the lands disposed to the complainer, containing the Bull of
 Burgh, &c. not only as lying within the said island of Southronald-
 say, but as being those “ which of old belonged to Robert
 “ Stewart

“Stewart of Burgh.” This is sufficient to connect this parcel with the above article in the valuation-book ; nor is it incumbent on the complainer to prove otherwise that his lands are the identical lands which belonged to the said Robert Stewart of Burgh, at the time of the valuation in 1653, or to produce a progress of writs from him down to his immediate author Sir Lawrence Dundas.

The Crown charter itself is sufficient for the purpose without any such progress; and as it is also proved that Sir Lawrence pays cess, in the same manner as his predecessors did, for the whole of this article of L. 146: 3: 4, it is impossible to doubt that the lands in question are the same that belonged to Robert Stewart of Burgh in the 1653; and also that they compose *the whole* of those lands which did then belong to him in this island, or to which the said article in the valuation-roll did apply, especially as it neither has been nor can be shown by the objector that there are any other lands in the island of Southronaldsay which belonged to Robert Stewart of Burgh in the 1653, and do now belong to any other person than Sir Lawrence and the complainer, or for which any other person does pay or has ever paid any part of the cess corresponding to the said article of L. 146: 3: 4.

And as to the particular names of the lands in question, such as *the Bull of Burgh*, &c. not being mentioned in the valuation-book, were there any thing in it to affect the complainer's qualification, it would likewise strike against almost every freehold-qualification in the county of Orkney. For it appears from the valuation-book itself that the names of particular lands are not generally entered in it; but the articles of valuation corresponding to the lands in each island or parish are commonly entered only under the names of the persons who were proprietors thereof at the time, or by the appellation of his lands or estate. In such articles it states how much free rent the heritor has in malt, meal, &c. and according to the number of meils, setteens, and merks of such rent the heritor has, the valued rent is from thence calculated and stated, according to a certain proportion which the valued rent was held to bear to the free real rent.

The objector therefore can derive no aid from this circumstance, owing to the peculiar nature of the rights and customs of that country, and the valuations thereof having been ascertained in a manner different from that followed in other counties of Scotland. It must

must be sufficient therefore, from the very nature of the thing, to entitle the complainer to this article of valuation, that his title-deeds give him right to the lands in this island, which of old belonged to Robert Stewart of Burgh, the person mentioned in this article in the valuation book; and that he and his authors do now and have always paid cefs for these lands conform to the whole of this article of valuation.

Besides, what would be *per se* decisive on this point, is a decret and other proceedings of the Commissioners of Supply, respecting this and other articles belonging to part of Sir Lawrence Dundas's estate.

The lands in question of old belonging to Stewart of Burgh, came afterwards to belong to Sir James Stewart of Burray, from whom they came, with the rest of Sir James's estate, to Alexander Earl of Galloway, and then to his son John Lord Garlies (the present Earl), who sold the whole to Sir Lawrence Dundas. But in the 1767, while they belonged to Lord Garlies, and when there was no contest about elections, his Lordship applied to the Commissioners of Supply, and obtained from them an extract signed by two of their number and the Clerk of Supply, of all the valuations of his lands in the island of Southronaldsay, according as the same stood rated in the original book of valuation and cast books of the county, dated 19th August 1767, in which, among others, an article is stated in these words: "He has for Robert Stewart of Burgh of " free rent within the said isle L. 146 : 3 : 4 Scots."

Lord Garlies having afterwards sold these lands, with the rest of the estate of Burray, to Sir Lawrence Dundas, Sir Lawrence, in June 1779, applied by petition to the Commissioners of Supply, setting forth the purchase that he had made from Lord Garlies of the estate of Burray, great part of which lay in the island of Southronaldsay, and that the lands composing the said estate in that island, for which Sir Lawrence and his authors had immemorially paid land-tax or cefs, stood rated in the valuation book in different articles, under the names of the persons to whom such parcels belonged at the time of the valuation, and from whence it, *inter alia*, appeared, " that L. 146 : 3 : 4 Scots is the valued rent of " the lands which at that time belonged to Robert Stewart of " Burgh;" and he therefore desired the Commissioners to ascertain, by their decret, that the articles appertaining to the said estate, standing in the valuation roll under other persons names, did now belong to him, Sir Lawrence, and for which he paid cefs.

This petition the Commissioners of Supply remitted to a committee of their number, who examined the valuation book, the several cast books or collection books which had from time to time been delivered by the Commissioners to their Collectors, the above-mentioned *extract* of Lord Garlies's valuation, the disposition by his Lordship to Sir Lawrence Dundas, and the inventory of the progress of writs relative thereto; and thereupon found, that Sir Lawrence had right to the articles of valuation stated in his petition and in the foresaid *extract*, and among which their report specially mentions "the lands that belonged to Stewart of Burgh, " now Sir Lawrence's property, the valued rent thereof extending " to L. 146:3:4 Scots." All this too being reported by the committee to a general meeting of the Commissioners, on the 7th October 1779, they, by their decret, *approved* of the report, and *interponed their authority thereto*, and also "appointed Sir Lawrence " Dundas's name to be put in the cast books of cess before the " names of each heritor in said *extract* whose lands were now Sir " Lawrence Dundas's property." And, at this general meeting, the present objector, Mr Baikie of Tankerness, and Mr Honeyman of Græmfay, were two of the Commissioners present, and concurring in the decret so pronounced.

Thus your Lordships see, that this precise article of valuation was, by a formal and regular decret of the Commissioners of Supply, found and declared to belong to Sir Lawrence, as in right of the lands now claimed upon, and for which he was entered in the cess books, and pays cess accordingly. This decret superseded all room for further enquiry by the freeholders, respecting the application of the article, and behoved to be held by them as conclusive evidence on that head, until reduced in this Court, at the suit of a party having a title and interest to challenge the same. And it is surely extraordinary, that Mr Baikie should have insisted so much on this captious and ill-founded objection, when he himself had been one of the Commissioners who pronounced that decret, and consequently must have been in the perfect knowledge of it.

Objection II- Mr Baikie's second objection to the complainer's claim, and which, with the following objections he also stated against several other claimants, was to this effect: "That the right claimed on " did not constitute a feudal right agreeable to the principles of " the feudal law. The claimant, by the condition of his convey- " ance, was barred from drawing any benefit from his feu duties,

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“ in regard that, by his acceptation of the right, he was bound
 “ to free and relieve Sir Lawrence Dundas, and his heirs, of all
 “ feu-duties, and other duties and casualties, payable to superiors,
 “ ministers stipends, schoolmasters salaries, cess and land-tax,
 “ and all other public burdens, payable forth of the said lands
 “ from and after the term of Whitsunday 1779; and as these pu-
 “ blic burdens did far exceed the feu-duties payable to the claim-
 “ ant yearly, the lands claimed on by him were not a true and
 “ real estate in him for his own use and benefit, but an obliga-
 “ tion or burden undertaken by him for the sole use of Sir Law-
 “ rence Dundas and his heirs.”

The very stating of this objection shows that the objector must Answer.
 not have understood or attended to the nature of the complainer's
 right, as the same appears *ex facie* to be in every respect a proper
 feudal right, framed in the most accurate manner, and agreeable
 to the proper form of all such conveyances. Neither has it laid
 any obligation or burden upon the complainer but such as he fell
 properly to be liable in by having right for his life to the superio-
 rity thereby disposed.

The clause alluded to by the objector is in these words: “More-
 “ over, I bind and oblige me, and my forefairs, to free and re-
 “ lieve the said John Traill, and the lands and others above dis-
 “ posed, of all feu-duties, and other duties and casualties, pay-
 “ able to superiors, ministers stipends, schoolmasters salaries, and
 “ all other public burdens payable forth of the same at and pre-
 “ ceding the term of Whitsunday last, which is hereby declared to
 “ have been the term of the said John Traill his entry thereto,
 “ notwithstanding of the date hereof, and of the cess or land-tax
 “ due at and preceding the 24th June last; the said John Traill
 “ being always, by his acceptation hereof, bound and obliged to
 “ free and relieve me, and my forefairs, of the said public bur-
 “ dens and land-tax thereafter, during his life.”

This clause is evidently most just and proper; for as the disposi-
 tion gave to the complainer the full right to the superiority of the
 lands (the property being already feued out and excepted in the
 disposition), and assigned him to the feu-duties and whole other
 duties and casualties that might be thereafter due and payable to
 him, as superior, together with the right and power of receiving
 and entering vassals and singular successors, and drawing the ne-
 cessary compositions, &c. so it was most just and agreeable to
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the usual form, that the complainer should be bound to relieve Sir Lawrence of the feu-duties payable for these lands to the Crown, and any other public burdens corresponding to them after his entry, if any such might be due out of them, or exigible from him, as superior, and not already laid upon the vassal as a burden on the property.

In short, it would have been equally absurd and unjust to have made Sir Lawrence continue liable in the burdens affecting the superiority during the time that all the profits of that superiority were transferred to and vested in the complainer; and as the property of the lands was already feued out, it can never be supposed, that the burdens falling upon the superiority singly will exceed the feu-duties and other casualties payable to the superior, nor in fact do they do so, though, were it the case, it could not afford any objection to the validity of the right which has vested in the complainer according to the feudal forms, a real and proper estate for his own use and benefit during his life.

Objection III. In the third place, Mr Baikie objected, "That the feisin produced for the claimant was void and null, in regard it did not specify upon what part of the lands therein mentioned the infeftment was taken."

Answer.

But the feisin having been taken in virtue of the clause of dispensation contained in the charter, and being also taken upon the lands themselves, it must have been unnecessary and absurd to have specified the identical spot in those lands where the act of infeftment was performed. The feisin specially recites the charter and disposition, and the whole description of the lands thereby conveyed, and in the entry bears, that the attorney, with the bailie, in presence of the notary and witnesses, "*accessit ad fundum terrarum subscript. tanquam locum sufficientem pro sasina capienda pro integris terris aliisq. postea specificat. virtute dispensationis postea mentionat. habens et in manibus suis tenens quandam cartam,*" &c. And then, after reciting the charter and disposition, and whole description of the lands, together with the clause of dispensation, and precept of feisin contained in the charter *verbatim*, and describing the act of infeftment "*per terræ et lapidis fundi dict. terrarum traditionem,*" it concludes, "*Acta erant hæc omnia super fundum dict. terrarum,*" &c.

This proves incontestably that the feisin was taken upon the ground of the lands mentioned, and described therein as disposed

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ned to the complainer; and certainly no more was requisite. Indeed, had the seisin been even taken at a place not within the lands disposed to the complainer, yet if it was so taken in terms of the dispensing clause, it would have been good, agreeable to sundry decisions of your Lordships; particularly one in the case of David Dundas, Esq; from the county of Linlithgow, where the point was also so decided by the House of Peers some years ago.

The fourth objection was, "That the seisin was void and null, Object. IV.
" in regard the full seisin was not ingrossed in the register, in
" terms of the act of parliament 1617, and the act of federunt
" 17th January 1756.

To this objection a sufficient answer was likewise made, namely, Answer.
that the objector had not specified in what respect the ingrossing of the seisin in the register was defective, and that it was sufficient for supporting the complainer's claim for inrolment, that the seisin itself was produced to the freeholders, bearing upon it the certificate of the proper officer, viz. the keeper of the register, that the seisin was duly recorded in the register of seisins for the county of Orkney upon the 25th September 1779, in the like manner as all registrations of seisins are certified.

5to, It was objected, "That the seisin was not dated and re- Object. V.
" gistrate one year before the teste of the writ for calling the pre-
" sent Parliament, as required by the act of the 12th Queen
" Anne."

A very full answer to this objection was made in the meeting, Answer.
as appears from the minutes, in which notice was taken of the decision, 17th January 1755, *Buchanan of Carbeath contra Cunningham of Ballindalloch*, where this objection had been repelled. But as your Lordships have likewise over-ruled it, in a multitude of cases decided this session, it would be improper for the complainer to say any more upon it.

The sixth and last objection bears, "That the seisin was not ta- Object. VI.
" ken in terms of the clause of dispensation contained in the char-
" ter on which it proceeds; and that, at any rate, the clause of
" dispensation could not obviate the defect above condescended
" on, viz. that the seisin did not mention the particular tenement
" on which it was taken, in regard that the clause of dispensation
" was not *especially* assigned to the claimant."

But this last objection evidently proceeded on a mistake, as ap- Answer.
pears from what has been already stated in answer to the third ob-
jection,

jection, where it was shown, from the words of the feisin itself, that the notary, attorney, &c. went to the ground of the lands for the express purpose of giving feisin, in virtue of the dispensation contained in the charter, and afterwards recited in the instrument of feisin itself. Agreeable thereto likewise, when the instrument afterwards describes the act of infeftment, it bears delivery of earth and stone of the ground of the lands disposed, “*secundum formam et tenorem ante dict. cartæ præcepti fasinæ supra insert. et dispensationis inibi content. et literarum dispositionis supra mentionat. in omnibus punctis.*”

It is surprising too, that the objectors should have argued that the dispensation could not obviate his former objection to the feisin, namely, that it did not mention the particular place where it was taken, because “the clause of dispensation was not specially assigned to the claimant :” For the disposition by Sir Lawrence Dundas to the complainer specially and expressly assigns to him the Crown *charter itself*, in so far as concerns the lands thereby disposed, “to the effect that, by virtue of the said charter and precept of feisin therein contained, and of this present right and assignation thereto, the said John Traill, &c. may be infeft in the said lands and others above disposed.”

This clearly conveyed to the complainer the whole clauses in the charter, and consequently the dispensation contained in it, to the effect that infeftment might be taken by the complainer, in the manner authorised by the dispensation which appointed that feisin might be effectually taken, either at the mansion-house of Burray, “*Vel super solo cujusvis partis vel portionis prædict. terrarum.*” An infeftment taken upon any part of the lands was therefore sufficiently warranted by that dispensation, to the benefit of which the complainer had an undoubted right ; and the instrument itself proves that the feisin was accordingly taken upon the ground of the lands, in virtue thereof.

May it therefore please your Lordships to grant warrant for serving this complaint upon the said Robert Baikie of Tankerness, the objector, personally, or at his dwelling-place, if within Scotland, or at the market-cross of Edinburgh, pier and shore of Leith, if furth thereof, and to ordain him to put in his answers thereto within fifteen days after the said service ; and upon the merits

merits of the complaint itself, to find, That the complainer had a good right to be put upon the roll of freeholders of the said county of Orkney, upon the 10th day of October last, and that the freeholders did wrong in then refusing to inroll him; and therefore to ordain him to be added to the roll of freeholders of the said county, and to give the necessary orders for carrying that judgement into execution.

According to justice, &c.

D A V. R A E.



